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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

FLYNT DISTRIBUTING CO., INC.,

Petitioner,

v.

JACKIE COLLINS LERMAN,

Respondent.

PETITIONER'S REPLY BRIEF

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Reply Argument

I

Respondent concedes *sub silencio* that "regardless of the resolution of the federal constitutional question presented [in *Lerman I*], the extraordinarily excessive $40 million verdict in respondent's favor could not possibly withstand appellate review on a number of grounds, including respondent's counsel's deliberate inflammation of the passion and prejudice of the jury" and a variety of State law grounds,[1] and that respondent, therefore, "unreasonably demanded an excessive bond, far beyond the financial ability of petitioner to post, and grossly disproportionate in view of the lack of merit to respondents' [sic] case." [2]

Instead of explaining why she was entitled to impose even a *plainly unreasonable* $1 million bond requirement upon petitioner, respondent attempts to deflect attention away from her wrongful insistence on a punitive bond and to twist to her advantage the fact that petitioner was unable, despite its undisputed best efforts, to precisely comply with the "scenario" outlined to the District Court by petitioner's

[1] Petition at 3 and 13, n.4.

[2] *Id.* at 13.

General Counsel, namely, that the bond would be secured by a letter of credit.[3] Respondent's arguments are demonstrably specious, however, and should be accorded no weight.

Respondent has *never* attempted to show how, and to what extent, she was allegedly prejudiced by petitioner's inability to secure the bond by posting a letter of credit, and the record is barren of proof of any such prejudice. It is undisputed that petitioner was financially distressed, and therefore would, in any event, have had to borrow $1 million[4] in order to collateralize even a "standby letter of credit" to secure a bond in that sum.[5]

The record is barren of any adverse consequence to respondent by reason of petitioner's inability to procure the contemplated letter of credit as the intermediate step in posting a $1 million bond. Petitioner would have had the expense of borrowing the $1 million regardless of whether

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[3] Brief in Opposition, at 7-9.

[4] Respondent grossly mischaracterizes the record in this regard. Petitioner made full disclosure to the District Court and respondent that a $1 million bond could be secured, "if they [petitioner] have a million dollars to put up," but it was made clear that petitioner did *not* have the ability to secure such an undertaking and that the funds would have to be advanced by petitioner's commercial lender. Respondent has never attempted to explain, much less prove, how petitioner could have possibly obtained either a $1 million surety bond or a $1 million letter of credit, or both, without borrowing $1 million from its lender.

The bonding company's demand for indemnity by petitioner's parent company and its corporate principal, in addition to a bank letter of credit, clearly signals petitioner's financial dilemma. (*See*, District Court colloquy excerpted by respondent [Brief in Opposition, at 3].)

[5] Respondent has never attempted to prove, and has never even claimed, that petitioner could have procured an *unsecured* $1 million bank letter of credit from any reputable lender. *And, see, e.g.*, Dolan, *The Law of Letters of Credit*, ¶12.05[1][b] (1984), at 12-13 ("the careful bank . . . investigates the *creditworthiness of [the] customer* and decides whether to seek *collateral*, guarantees or other protection against default of the customer's obligation to reimburse the bank . . . " in the event the letter of credit is drawn upon) (emphasis added).

deposited with a bank, to collateralize a letter of credit, or (as actually occurred) directly with the bonding company, as the primary collateral for the bond. The only difference would have been (*i*) a bank would have paid interest on the $1 million collateral, whereas the bonding company does not, and (*ii*) petitioner would have incurred bank charges for issuance of the letter of credit, whereas such charges were *not* incurred in this case because a letter of credit could not be obtained despite petitioner's best efforts to do so.[6]

Respondent was not prejudiced by the failure of the bonding company to pay interest in this case because the District Court, faithful to the "careful scrutiny" standard of *Farmer v. Arabian American Oil Co.*, 379 U.S. 227 (1964), awarded *only* the "interest differential" between the interest expenses incurred in the borrowing and the interest which would have been earned at money market rates.[7] Assuming, *arguendo,* that the District Court was correct in mitigating petitioner's damages,[8] its determination clearly mooted any complaint by respondent in this regard.

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[6] Because respondent called no witnesses and introduced no evidence in support of her claims below, the record is barren of any evidence, and the courts below made no findings, as to the ultimate cost differential, if any, between following the "scenario" described by petitioner's General Counsel and the actual course which this case then took. The Court of Appeals summarily rejected petitioner's request for such a determination when it denied, without opinion, the petition for rehearing below.

[7] Respondent's desperate argument that the District Court awarded the interest differential "without a further hearing and without explaining its reasoning" (Brief in Opposition, at 5) is pure sophistry. The motion for reargument raised no disputed issues of fact; the District Court conferenced the matter by telephone to ascertain the parties' respective positions on the motion; no party requested a "further hearing"; and the District Court rendered a formal Opinion, reproduced in the Appendix to the Petition, at A9-10, setting forth its reasoning.

[8] Petitioner argued below that respondent had, and completely failed to satisfy or even attempt to satisfy, the burden of persuasion on her mitigation defense. It is an indication of the lengths to which the District Court went to "carefully scrutinize" the record

(*footnote continued on following page*)

Nor was respondent prejudiced by *lack* of the bank charges which would necessarily have been incurred had it proved possible to obtain the contemplated letter of credit. Such bank charges would only have *increased* petitioner's appellate costs and respondent surely cannot be heard to complain about costs which were *not* incurred.

In light of the District Court's award of only the "interest differential" (rather than the full amount of interest expenses actually incurred by petitioner in order to collateralize and post the supersedeas bond in this case), the discrepancy between the "scenario" allegedly relied upon by respondent and the actual facts is immaterial, since the "interest differential" would have been *the same* in either case and, as events actually took place, petitioner did *not* incur the expense of posting a letter of credit, thereby *reducing* the appellate costs and, because respondent lost on appeal, *actually saving her money*.[9]

Respondent preferred the "scenario" outlined by petitioner's General Counsel in his colloquy with the District Court *not* because it was necessarily less expensive than direct collateralizing of a supersedeas bond (as, indeed, it was not), but because respondent feared that a bankruptcy filing by petitioner would result in recapture of any property pledged directly by petitioner to the bonding company, resulting in cancellation of the bond. Respondent's counsel emphasized

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(*footnote continued from preceding page*)
that it *sua sponte* shifted the burden of proof on this affirmative defense to petitioner, requiring it, and not respondent, to submit the "interest differential" computations below.

[9] Thus, assuming, *arguendo*, that "saving [respondent] money" is anything more than merely one (1) of the factors to be taken into account in the District Court's exercise of discretion, *see, Trans World Airlines, Inc. v. Hughes*, 515 F.2d 173, 178 (2d Cir. 1975), *cert. den.*, 424 U.S. 934 (1976), the award to petitioner in this case met that test, in that the award was (*i*) reduced to the "interest differential" cost which would have been incurred in any case, and (*ii*) petitioner did *not* incur, and respondent was thus not charged with, the cost of the contemplated letter of credit, which was never obtained.

that respondent wanted "real" rather than "illusory" security, and in the circumstances of this case nothing would have been more "illusory" than a supersedeas bond secured by property subject to recapture in the event of petitioner's bankruptcy. The letter of credit "scenario," in comparison, shifted the risk of petitioner's bankruptcy to the bank issuing the letter of credit; the letter of credit would have remained in place regardless of any bankruptcy by petitioner, thereby keeping the supersedeas bond in full force and effect regardless of petitioner's ensuing financial condition.[10]

II

Similarly disingenuous is the argument that "[t]here is no issue here of meaningful appellate review in a First Amendment case because petitioner *agreed* to post a bond it could afford.[11] There was no waiver of petitioner's basic objection to posting a bond and the "agreement" referred to by respondent can only be understood in the context in which it was made, which respondent utterly fails to explain.

Petitioner "agreed" to post a $1 million bond only *after* its motion for a stay pending appeal *without bond* (or, in the alternative, for a bond of no more than $465,000, equal to the highest libel/invasion of privacy verdict ever sustained on appeal to that point in time) was *denied* and the District Court tentatively imposed a *$10 million bond requirement:*

> THE COURT: I'm going to tell you what I'm going to do. I am going to set a bond at this point at *ten million dollars.* I leave it to you gentlement to figure out how you're going to do it, whether it is receivables, real estate, whatever, *cash.*

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[10] Petitioner did *not* file for bankruptcy. Nevertheless, much of the argument during the "bond hearings" centered around the then distinct possibility that it might be forced to do so, with respondent consistently arguing that she not be provided with security which might prove worthless (*i.e.*,"illusory").

[11] Brief in Opposition, at 6, n.* (emphasis in original).

> It could be partially a surety bond, but I want you to come back to me within 48 hours [i.e., by July 13, 1983] and tell me how it is going to be. If it is not done within 48 hours, when I say, "Done within 48 hours," I mean the papers in my hand so that I may sign them, *you may go ahead and execute on your judgment.*
>
> * * *
>
> MR. GRUTMAN: [What] His Honor h[a]s given is 48 hours, Mr. Rudofsky. That gives us to the 13[th]?
>
> MR. RUDOFSKY: * * * I presume we should *follow the path that was chart[ed] in the District Court opinion in TWA. We have [go]t to sit down and work it out and report to the court if we possibly can [agree].*
>
> MR. GRUTMAN: If we can't [agree], *we'll have papers here for execution on Wednesday morning at ten o'clock your Honor.*
>
> MR. RUDOFSKY: You have made your point.
>
> (Emphases added.)

Subsequently, respondent was unwavering in her demand for a $1 million bond *plus other security.*[12] The compromise $1 million bond was finally "agreed" upon only under the

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[12] At the initial bond hearing, respondent's counsel's comments included the proposal that respondent would "hold a portion of [petitioner's accounts receivable] *above and beyond the one million dollar bond* . . . . " At the continued hearing, counsel repeatedly struck the same note, for example, "perhaps we can make some arrangement that *builds around the million dollar bond . . . and that adds to the same concept regarding the receiver* . . . . ; and, likewise, "[m]y concern is *a one million [dollar] bond isn't enough* if [petitioner] continue[s] to run the company . . . . " At the same hearing, and to the same effect, petitioner's counsel remarked to respondent's counsel: "[Y]ou want a one million dollar bond . . . *plus a guarantee of all [the] other things[,] of ten million dollars* . . . . "

compulsion of the District Court's prior $10 million bond ruling and the express threat by respondent's counsel of imminent execution of the then-$40 million judgment.[13] The $1 million bond at least protected petitioner from execution of that judgment, and the consequent destruction of its business or bankruptcy which would follow, and preserved its right of appeal.[14] It was in this sense, *and no other,* that the compromise was reported to the District Court after arduous negotiations as "good news."

III

Respondent does not seriously dispute that a result opposite to that below would obtain under the Ninth Circuit cases relied upon by petitioner. Instead, she attempts to avoid the obvious conflict between the circuits by contending that the 1979 amendments to Federal Rule of Appellate Procedure 39 render the line of Ninth Circuit cases relied

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[13] Respondent's excerpting of the "agreement" colloquy between petitioner's General Counsel and the District Court conveniently omits the portion of the colloquy in which petitioner reported, as a material element of the "scenario" upon which respondent claims she relied, that petitioner required until "5 p.m. on Monday," July 18th, in order to obtain the contemplated letter of credit and indemnities required before the bond would be issued. The District Court *refused* to grant the necessary time and arbitrarily ("THE COURT: I am not going to listen to any speech. Get it done.") imposed a deadline of "[t]welve o'clock tomorrow," *i.e.,* Friday, July 15th, despite being expressly advised by petitioner's counsel that "the bank apparently cannot move fast enough" to comply with such a deadline.

Respondent thus could not possibly have relied upon the letter of credit "scenario" unfolding as described, or have been misled in any way, since the District Court itself did not provide enough time for the "scenario" to be carried out, and it was clear *ab initio* that petitioner was going to have to make alternate arrangements for the issuance of the required $1 million supersedeas bond.

[14] As stated in the text, *supra,* there was no waiver of petitioner's basic objection to the posting of a bond (or, in the alternative, a bond greater than $465,000), and despite respondent's out-of-context reference to the $1 million bond "agreement" following the *denial* of petitioner's bond motion, no waiver of this objection is alleged in respondent's brief.

upon by petitioner "not controlling." [15] Neither of the courts below nor any other court has ever so held; respondent cites no authority for her *ipse dixit;* and our research reveals this preposterous view to be respondent's alone.

Professor Moore explains, directly contrary to respondent's argument, that Rule 39 "follows the usual practice in the circuits prior to the promulgation of the Appellate Rules" [*see, e.g., The Europe,* 190 F. 475 (9th Cir. 1911)] and that the 1979 amendments to Rule 39 affected only subdivisions (c) and (d) of that rule, *not subdivision (e). See,* 9 *Moore's Federal Practice,* ¶239.01[i] and [3] (1985). *See, also,* 16 Wright & Miller, *Federal Practice And Procedure,* §3985, p. 381-2 (1986 Supp.).

The authoritative Ninth Circuit cases relied upon by petitioner [and, in the case of *Sunkist Growers, Inc. v. Winkler & Smith Citrus Products,* 316 F.2d 275 (9th Cir. 1962), cited by the Second Circuit in *Trans World Airlines, Inc. v. Hughes, supra*] remain good law and sharply conflict with the rule of law promulgated by the Second Circuit on the appeal below. For this reason alone, certiorari should be granted in order to resolve the conflict among the circuits.

CONCLUSION

For all of the foregoing reasons, as well as those stated in the Petition dated September 16, 1986, a writ of certiorari should issue to review the decision and judgment of the United States Court of Appeals for the Second Circuit in this case.

Respectfully submitted,

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